



Office of the Attorney General

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In recent years, the Department of Justice has brought a number of lawsuits on the behalf of the Environmental Protection Agency, alleging that certain companies have "modified" their pollution-emitting facilities in violation of the Clean Air Act. Pursuant to a directive from the National Energy Policy Development Group, the Office of Legal Policy has reviewed these so-called new source review enforcement actions, and has concluded that EPA has a reasonable basis for arguing that the lawsuits are consistent with the Clean Air Act and its regulations. I hereby adopt this conclusion and the accompanying report as the position of the Department of Justice.

The new source review program, which Congress established in 1977, is designed to prevent deterioration of our nation's air quality. It requires certain facilities, such as electric utilities and oil refineries, to obtain permits before they construct new sources of air pollution, and to install devices that will reduce the amount of toxic materials released into the atmosphere. In addition, both requirements apply to facilities that "modify" their existing sources of air pollution.

The meaning of "modification" has generated a great deal of controversy. If a construction project is a modification that causes a significant increase in emissions, the facility is subject to new source review and the requirement that it install pollution-control devices. If, by contrast, the project is "routine maintenance," or does not produce a significant emissions increase, the new source review requirements do not apply. The EPA to date has not issued a regulation that explains which types of construction projects it considers "routine maintenance," and hence exempt from new source review.

The Department, on behalf of the EPA, currently is pursuing a number of enforcement actions against companies, in an array of industries, that allegedly have "modified" their facilities in violation of the new source review program. These companies, in turn, contend that their construction projects are "routine maintenance," that the projects have not caused an increase in emissions, or that the EPA impermissibly has changed its interpretation of what constitutes a "modification."

In May 2001, the National Energy Policy Development Group directed the Department of Justice to review whether the enforcement actions are consistent with the Clean Air Act and its implementing regulations. The Department's Office of Legal Policy has conducted the review and reports its conclusions in this study, "New Source Review: An Analysis of the Consistency of Enforcement Actions with the Clean Air Act and Implementing Regulations."

This review asks two questions. First, is the EPA's interpretation of "modification" reasonable in light of the Clean Air Act? And second, should the EPA have initiated a public rulemaking pursuant to the Administrative Procedure Act before it brought the enforcement actions?

The Department concludes that the EPA has a reasonable basis for arguing that the enforcement actions are consistent with both the Clean Air Act and the Administrative Procedure Act. First, there is a reasonable basis for the EPA's argument that its interpretation of "modification" is entitled to judicial deference. Courts generally defer to reasonable agency interpretations of ambiguous statutory or regulatory provisions which they are charged to administer. The distinction between a "modification" and "routine maintenance" is sufficiently ambiguous to trigger EPA discretion, and deciding between these two alternatives implicates policy considerations that Congress has assigned to the EPA.

Second, the Department concludes that the enforcement actions are consistent with the Administrative Procedure Act. Although the New Source Review program has been in effect since 1977 the EPA did not until recently file enforcement actions alleging that certain facilities' construction projects constitute "modifications." Nevertheless, the EPA may reasonably argue that its alleged failure to enforce the new source review provisions of the Clean Air Act in the past did not reflect a binding interpretation of that statute. Instead, the initiation of the enforcement actions constituted merely a change in enforcement strategy within the discretion of the agency under the Administrative Procedure Act.

In light of these conclusions, the Department of Justice will continue, as it has during this review, to pursue the EPA's enforcement actions before the federal judiciary, and the Environment and Natural Resources Division will make litigation or settlement judgments according to the merits of each case.

In conducting this review, the Department has not engaged in a substantive policy analysis, but instead has conducted the sort of analysis it typically would bring to bear in evaluating any enforcement action. To decide whether to advance a federal agency's enforcement decisions, the Department ordinarily must balance a number of competing considerations, including deference to the agency's policy views and an important measure of independent legal judgment. Accordingly, in carrying out its review, the Department has no occasion to consider whether the EPA's enforcement decisions are wise as a matter of policy; instead, the Department has asked only whether the EPA has a reasonable basis for the positions it seeks to advance in court.

Moreover, for the same reasons, the effect of the Department's review is entirely retrospective. It only examines the currently pending enforcement actions, and expresses no opinion on how the Clean Air Act should be enforced in the future. In addition, the review does not examine whether, from the standpoint of environmental policy, it is prudent for the EPA to interpret the Clean Air Act in the manner it has chosen. Nor does it address whether, as a matter

of enforcement strategy, the EPA's decision to litigate is preferable to the issuance of a new regulation. Congress has charged the EPA, not the Department of Justice, with the responsibility to administer the Clean Air Act; the authority to issue statutory interpretations and make policy determinations therefore belongs to the EPA.

Having concluded that the EPA has a reasonable basis for bringing the enforcement actions, the Department of Justice will continue to prosecute these lawsuits before the federal judiciary. The Department also will continue to negotiate with industry defendants to reach mutually beneficial settlements. Whether through court judgments or settlement agreements, the Department of Justice will make every effort to ensure that those who are in violation of our nation's environmental laws will be held accountable, and that the laws protecting our nation's environment are faithfully executed.

A handwritten signature in black ink, appearing to read "John Ashcroft", written in a cursive style.

John Ashcroft
Attorney General